

EXHIBIT K

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

January 26, 2012

IN RE:

**BELLSOUTH TELECOMMUNICATIONS LLC D/B/A AT&T
TENNESSEE V. HALO WIRELESS, INC.**

)
) **DOCKET NO.**
) **11-00119**
)

ORDER

This matter came before Chairman Kenneth C. Hill, Director Sara Kyle and Director Mary W. Freeman of the Tennessee Regulatory Authority ("Authority" or "TRA"), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on January 23, 2012 for consideration of the *Complaint* filed by BellSouth Telecommunications, LLC d/b/a AT&T Tennessee ("AT&T") against Halo Wireless, Inc. ("Halo") and Halo's *Motion to Dismiss Complaint With Prejudice*.

TRAVEL OF THE CASE

On July 26, 2011, AT&T filed a *Complaint* against Halo, pursuant to 47 U.S.C. § 252 and TRA Rule 1220-1-2-.02, requesting that the TRA issue an order "allowing it to terminate its wireless Interconnection Agreement ("ICA") with Halo based on Halo's material breaches of that ICA."¹ The *Complaint* also states that AT&T "seeks an Order requiring Halo to pay AT&T Tennessee the amounts Halo owes" as a result of "an access charge avoidance scheme."² On August 10, 2011, Halo filed a Suggestion of Bankruptcy informing the TRA that "on August 8, 2011 Halo filed a voluntary petition under Chapter 11 of Title 11 of the United States Code in the

¹ *Complaint*, p. 1 (July 26, 2011).

² *Id.*

United States Bankruptcy Court for the Eastern District of Texas (Sherman Division))” (“Bankruptcy Court”).³ Accordingly, Halo stated, “the automatic stay is now in place” and “prohibits further action against [Halo] in the instant proceeding.”⁴

On August 19, 2011, Halo filed a notice of removal to federal district court, which references a separate notice of removal and states that this matter has been removed to the United States District Court for the Middle District of Tennessee, Nashville Division (“District Court”) “pursuant to 28 U.S.C. § 1452 and Rule 9027 of the Federal Rules of Bankruptcy Procedure.”⁵ On November 10, 2011, AT&T filed a letter informing the TRA that it may now hear this matter, the District Court having remanded it to the TRA and the Bankruptcy Court having lifted the automatic stay on a limited basis. AT&T requested that this matter be placed on the agenda for the Authority Conference scheduled for November 21, 2011 “for appointing a Hearing Officer and other action as necessary.”⁶ On November 17, 2011, Halo filed a *Motion to Abate*, in which Halo requested that the TRA “abate” this proceeding until conclusion of Halo’s appeal of the Bankruptcy Court’s October 26, 2011 Order to the United States Court of Appeals for the Fifth Circuit.

At the regularly scheduled Authority Conference held on November 21, 2011, the Authority voted unanimously to deny the *Motion to Abate* and to convene a contested case in this matter and appoint Chairman Kenneth C. Hill as Hearing Officer to handle any preliminary matters, including entering a protective order, ruling on any intervention requests, setting a procedural schedule, and addressing other preliminary matters.⁷ Immediately following the Authority Conference, the Hearing Officer convened a scheduling conference in this matter.

³ *Suggestion of Bankruptcy*, p. 1 (August 10, 2011).

⁴ *Id.* at 2.

⁵ *Notice of Removal to Federal Court*, p. 1 (August 19, 2011).

⁶ Letter from Joelle Phillips to Chairman Kenneth C. Hill (November 10, 2011).

⁷ *Order Denying Motion to Abate, Convening a Contested Case and Appointing a Hearing Officer* (December 19, 2011).

On December 1, 2011, Halo filed *Halo Wireless, Inc.'s Partial Motion to Dismiss and Answer to the Complaint of BellSouth Telecommunications, LLC d/b/a AT&T Tennessee* ("Partial Motion to Dismiss"), and AT&T filed its response to Halo's motion on December 8, 2011. The Hearing Officer heard arguments from AT&T and Halo (collectively, "the Parties") on the *Partial Motion to Dismiss* on December 12, 2011, and issued an order denying the *Partial Motion to Dismiss* on December 16, 2011.⁸ The Parties submitted pre-filed direct testimony of their witnesses on December 19, 2011, and pre-filed rebuttal testimony on January 3, 2012. In addition, the Parties submitted pre-hearing memoranda on January 6, 2012.

MOTION TO DISMISS COMPLAINT WITH PREJUDICE

After business hours on Friday, January 13, 2012, Halo filed *Halo Wireless, Inc.'s Notice of May 16, 2006 Order Confirming Plan of Reorganization of Transcom Enhanced Services and Motion to Dismiss Complaint With Prejudice* ("Motion to Dismiss Complaint With Prejudice"). At the beginning of the Hearing on January 17, 2012, Chairman Hill addressed the *Motion to Dismiss Complaint With Prejudice*, giving AT&T an opportunity to respond and setting the matter for consideration during the January 23, 2012 Authority Conference. AT&T filed *BellSouth Telecommunications, LLC dba AT&T Tennessee's Response to Halo Wireless, Inc's Motion to Dismiss Complaint With Prejudice* ("Response") on January 19, 2012.

As more fully explained in the discussion of AT&T's *Complaint* below, Halo's business plan is centered on their assertion that Transcom Enhanced Services, Inc. ("Transcom") is an Enhanced Service Provider ("ESP"). In its *Motion to Dismiss Complaint With Prejudice*, Halo requests that the TRA dismiss AT&T's *Complaint* with prejudice on the grounds that during

⁸ *Order Denying Motion to Dismiss* (December 16, 2011).

Transcom's 2005 bankruptcy proceeding,⁹ BellSouth/AT&T Corporation were creditors/parties in interest.¹⁰ In the Transcom Bankruptcy Court's April 28, 2005 Memorandum Opinion, the Court concluded that "[Transcom]'s service is an enhanced service, not subject to payment of access charges."¹¹ Some of the creditors appealed the April 28, 2005 order to the United States District Court for the Northern District of Texas, Dallas Division ("Transcom District Court"), but the Transcom District Court dismissed the appeal as moot and vacated the bankruptcy court's Order and Memorandum Opinion.¹² However, the Transcom Bankruptcy Court entered an order on May 16, 2006 confirming Transcom's bankruptcy plan.¹³ In this Confirmation Order, the Transcom Bankruptcy Court again stated that Transcom's services are not subject to access charges, but rather qualify as information services and enhanced services that must pay end-user charges.¹⁴ No creditor appealed the May 16, 2006 Order.¹⁵ Halo argues that because this Confirmation Order is binding, AT&T cannot challenge Transcom's status as an ESP.¹⁶ In addition, Halo asserts that *res judicata* or collateral estoppel bars the claims that have been litigated in the bankruptcy court.

To assert a *res judicata* defense, a party must establish: 1) the parties must be identical in both suits; 2) the prior judgment must have been rendered by a court of competent jurisdiction; 3) there must have been a final judgment on the merits; and 4) the same cause of action must be involved in both cases.¹⁷ Halo claims that these standards are satisfied because 1) BellSouth was a party to the Transcom bankruptcy case and litigants who have a close and significant relationship (e.g. Transcom/Halo) satisfy the "identical parties" test; 2) the Transcom Bankruptcy Court had

⁹ Transcom filed a voluntary petition for Chapter 11 bankruptcy in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, ("Transcom Bankruptcy Court") on February 18, 2005 in Case No. 05-31929-HDH-11 ("Transcom bankruptcy"). See *Motion to Dismiss Complaint With Prejudice*, p. 2, ¶ 3 (January 13, 2012).

¹⁰ *Motion to Dismiss Complaint With Prejudice*, p. 2, ¶ 4 (January 13, 2012).

¹¹ *Id.* at 3, ¶ 7.

¹² *Id.*

¹³ *Id.* at 4, ¶ 10.

¹⁴ *Id.*

¹⁵ *Id.* at 4, ¶ 11.

¹⁶ *Id.* at 6, ¶ 14.

¹⁷ *Id.* at 6, ¶ 17, citing *Osherow v. Ernst & Young, LLP (In re Intellogic Trace, Inc.)*, 300 F.3d 382, 386 (5th Cir. 2000).

jurisdiction over the 2006 Confirmation Order; 3) the 2006 Confirmation Order is final; and 4) the two actions are based on the same nucleus of operative facts, because the primary issue in both proceedings is whether Transcom provides enhanced services.¹⁸

Collateral estoppel precludes a party from litigating an issue already raised in an earlier action if: 1) the issue at stake is identical to the one involved in the earlier action; 2) the issue was actually litigated in the prior action; and 3) the determination of the issue in the prior action was a necessary part of the judgment in that action.¹⁹ Halo asserts that 1) AT&T's *Complaint* confronts the authority with an identical issue to that raised in the 2006 Transcom Bankruptcy Court's Confirmation Order, i.e. that Transcom is an ESP not subject to access charges; 2) the issue was litigated in 2006 in the Transcom bankruptcy proceeding; and 3) the determination that Transcom is an ESP was a necessary part of the Confirmation because if it were not, the Plan would not have been feasible and the Confirmation would have been denied.²⁰

AT&T opposes the *Motion to Dismiss Complaint With Prejudice* on the grounds that the Motion is at odds with the Federal Communications Commission's ("FCC") *Connect America Fund Order*.²¹ AT&T argues that none of the Transcom bankruptcy court proceedings or other earlier proceedings cited by Halo is binding on either AT&T or the Authority.²² None of the Transcom Bankruptcy Court orders states or suggests that Transcom actually is an end-user, and none of them implies or says anything about the termination or origination of calls.²³ Rather, an ESP is treated as

¹⁸ *Motion to Dismiss Complaint With Prejudice*, pp. 7-8, ¶¶ 18-26 (January 13, 2012).

¹⁹ *Id.* at 10, ¶ 28, citing *Petro-Hunt, L.L.C. v. U.S.*, 365 F.2d 385, 397 (5th Cir, 2004).

²⁰ *Id.* at 10-11, ¶¶ 27-30.

²¹ *Response*, p. 1 (January 19, 2012); *See Report and Order and Further Notice of Proposed Rulemaking, In the Matter of Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109; GN Docket No. 09-51; CC Docket Nos. 01-92, 96-45; WT Docket No. 10-208; FCC 11-161, ___ FCC Rcd ___ ("*Connect America Fund Order*") (November 18, 2011).

²² *Response*, p. 3 (January 19, 2012).

²³ *Id.* at 4.

an end-user for the purpose of being exempted from access charges, nothing more.²⁴ Further the exemption applies only to ESPs, not carriers (like Halo) that transport calls for ESPs.²⁵ AT&T asserts that the Authority rejected Halo's *res judicata* and collateral estoppel arguments when it rejected Halo's *Partial Motion to Dismiss*.²⁶ AT&T further asserts that *res judicata* and collateral estoppel cannot apply because: 1) the main order Halo relies upon was vacated by the federal district court; 2) the bankruptcy cases involved Transcom, not Halo, and therefore were not between identical parties; 3) the Transcom bankruptcy cases did not involve the same cause of action as this case, since this case involves claims for Halo's breach of a contract that was not even formed until after the bankruptcy cases, while the bankruptcy cases involved the issue of whether Transcom was subject to access charges; and 4) the issue in this case (whether Transcom must be deemed to originate or re-originate calls) was never raised, much less decided, in the bankruptcy cases.²⁷

The Authority agrees with AT&T that neither *res judicata* nor collateral estoppel applies in this case. The panel finds that *res judicata* does not apply because the Transcom bankruptcy case and this docket do not involve identical parties and this is a breach of contract case and, therefore, is not the same cause of action. The panel also finds that collateral estoppel does not apply because the issue in this case - the origination or re-origination and termination of Halo's calls - was not raised in the Transcom bankruptcy case. Based on these findings, the Authority concludes unanimously that Halo's *Motion to Dismiss Complaint With Prejudice* should be denied.

THE HEARING

A Hearing in this matter was held before the voting panel of Directors assigned to this docket on January 17, 2012. The Hearing was publicly noticed by the Hearing Officer on

²⁴ *Id.*

²⁵ *Id.* at 4, n. 8.

²⁶ *Id.* at 3, n. 6.

²⁷ *Id.*

December 16, 2011 and January 12, 2012. Participating in the Hearing were the following parties and their respective counsel:

For BellSouth Telecommunications, LLC d/b/a AT&T Tennessee – Joelle Phillips, Esq., 333 Commerce Street, Suite 2101, Nashville TN 37201 and **J. Tyson Covey, Esq.**, Mayer Brown, LLP, 71 S. Wacker Drive, Chicago, IL 60606.

For Halo Wireless, Inc. – Paul S. Davidson, Esq., Waller Lansden Dortch & Davis, LLP, 511 Union Street, Suite 2700, Nashville, TN 37219; **Steven H. Thomas, Esq.** and **Jennifer M. Larson, Esq.**, McGuire, Craddock & Strother, P.C., 2501 N. Harwood, Suite 1800, Dallas, TX 75201; **W. Scott McCollough, Esq.**, McCollough/Henry PC, 1250 S. Capital of Texas Highway, Bldg. 2-235, West Lake Hills, TX 78746.

During the Hearing, the Authority heard testimony from AT&T witnesses J. Scott McPhee and Mark Neinast. Russ Wiseman and Robert Johnson testified for Halo.

AT&T's COMPLAINT

In its *Complaint*, AT&T seeks to terminate its wireless ICA with Halo because Halo has violated the ICA by sending AT&T large volumes of traffic that does not originate on a wireless network. AT&T further asks the TRA to order Halo to pay it the amounts that it owes AT&T. AT&T asserts that the TRA has jurisdiction over this matter, because it involves (1) violations of an ICA entered into under 27 U.S.C. §§ 251 and 252 that was approved by the Authority and (2) violations of AT&T Tennessee's state tariffs.²⁸ The *Complaint* contains four counts:

Count 1 - Breach of ICA: Sending Wireline-Originated Traffic to AT&T Tennessee: AT&T charges that Halo sends AT&T traffic that is wireline-originated, interstate, interLATA or intraLATA toll traffic and that Halo disguises it as local traffic to avoid access charges that apply to such traffic. AT&T asks the TRA to order Halo to terminate the Parties' ICA for this breach or, in

²⁸ *Complaint*, p. 3 (July 26, 2011).

the alternative, to order Halo to cease and desist from sending wireline-originated traffic not authorized by the ICA to AT&T.²⁹

Count 2 - Breach of ICA: Alteration or Deletion of Call Detail: AT&T alleges that Halo consistently alters the Charge Number ("CN"), which prevents AT&T from properly billing Halo based on where the traffic originated. AT&T requests that the Authority authorize it to terminate the Parties' ICA, or, in the alternative, to order Halo to cease and desist from altering the CN on traffic that it delivers to AT&T.³⁰

Count 3 – Payment for Termination of Wireline-Originated Traffic: The wireline-originated traffic that Halo previously sent to AT&T is not governed by the Parties' ICA but is instead subject to tariffed switched access charges. AT&T therefore asks the Authority to order Halo to pay all access charges due to AT&T within thirty days of the Authority's order.³¹

Count 4 – Breach of ICA: Non-payment for Facilities: AT&T asks the TRA to order Halo to pay it for transport facilities that AT&T has provided but for which Halo has refused to pay.³²

POSITIONS OF THE PARTIES

The Parties have set forth their arguments in full in the record of this docket, in their pre-hearing memoranda and in the presentation of their cases at the Hearing. The following section is intended as a *brief* summary of the positions of AT&T and Halo in this matter.

Position of AT&T Tennessee

AT&T asserts that Halo has engaged in three separate types of breaches of the Parties' ICA.³³ Although the ICA requires Halo to send only wireless-originated traffic to AT&T, 74% of

²⁹ *Id.* at 3-4.

³⁰ *Id.* at 4-5.

³¹ *Id.* at 5-6.

³² *Id.* at 6.

³³ *Pre-hearing Memorandum of BellSouth Telecommunications, LLC dba AT&T Tennessee*, p. 1 (January 6, 2012).

the traffic Halo sends to AT&T is landline-originated traffic.³⁴ According to AT&T, Halo's contention that it is not breaching the ICA is based on a "wireless in the middle" theory, where Transcom is an ESP; ESPs are treated as end-users; and Transcom must be deemed to "re-originate" every call that passes through Transcom to Halo.³⁵

AT&T argues that the FCC has expressly rejected Halo's theory in the *Connect America Fund Order*, where the FCC singled out Halo by name.³⁶ The FCC rejected Halo's theory that calls that begin with an end-user dialing a call on a landline network can be "re-originated" as wireless calls by passing through an ESP with wireless equipment in the middle of the call.³⁷ Further, the ESP exemption from access charges applies only to ESPs themselves, not to carriers like Halo that serve them.³⁸ AT&T asserts, however, that Transcom is not an ESP because reducing background noise and inserting "comfort noise" in periods of silence do not alter the fundamental character of the service from the end-user's perspective.³⁹

AT&T argues that its call study showing 74% of the calls Halo sends to AT&T are landline-originated is reliable. Further, Halo does not deny that at least some of its calls it sends to AT&T are landline or IP-originated,⁴⁰ which results in a breach of the ICA.⁴¹

³⁴ *Id.* at 5. The terms "wireline" and "landline" are used interchangeably in the parties' testimony. For background, federal law specifies that wireless calls that originate and terminate within the same Major Trading Area ("MTA") are "local calls" and subject to reciprocal compensation rates. Calls exchanged between end-users in different MTAs are considered "InterMTA" and are subject to tariffed interstate or intrastate access charges, which are higher than reciprocal compensation rates. Calls that originate from landline telephones are considered "local" if they both originate and terminate within the same local exchange area. Intercarrier compensation rates for intra-exchange calls are set by the landline ICA; the rates for intrastate inter-exchange calls are set by the state access tariff, and the rates for interstate inter-exchange calls are set by the FCC access tariff. *See* J. Scott McPhee, Pre-filed Direct Testimony, p. 9 (December 19, 2011).

³⁵ *Id.*

³⁶ *Pre-hearing Memorandum of BellSouth Telecommunications, LLC dba AT&T Tennessee*, p. 6 (January 6, 2012).

³⁷ *Id.* at 7.

³⁸ *Id.* at 9.

³⁹ *Id.* at 10-11.

⁴⁰ The term "IP" refers to Internet Protocol.

⁴¹ *Id.* at 11-12.

AT&T asserts that Halo also breached the ICA by inserting false charge numbers; specifically, Halo inserts a Transcom Charge Number ("CN") on every call, and the effect is that every call appears local.⁴²

AT&T alleges that Halo is breaching the ICA by refusing to pay for interconnection facilities it obtains from AT&T. Because 100% of the traffic between the Parties is traffic that Halo terminates on AT&T's network, Halo is responsible for 100% of the cost of the interconnection facility under the Parties' wireless ICA.⁴³

Position of Halo Wireless, Inc.

Halo asserts that it is not in breach of the ICA and AT&T is not entitled to "significant amounts of money" from Halo for the traffic at issue.⁴⁴ Halo further asserts that it has a valid and subsisting Radio Station Authorization from the FCC authorizing Halo to provide wireless service as a common carrier and to operate stations in the "3650-3700" MHz band,⁴⁵ and is therefore governed exclusively by federal law.⁴⁶ Halo argues that the FCC has exclusive jurisdiction over federal licensing and that a state commission cannot take any action that would amount to a suspension or revocation of a federal license.⁴⁷

Halo provides Commercial Mobile Radio Service ("CMRS") and sells telephone exchange service to Transcom, which is a high volume customer.⁴⁸ Halo asserts that Transcom is an ESP because it changes the information content of every call that passes through its system and also

⁴² *Id.* at 12-13.

⁴³ *Id.* at 14-15.

⁴⁴ *Halo Wireless, Inc.'s Pre-hearing Memorandum*, p.1 (January 6, 2012).

⁴⁵ Russ Wiseman Pre-filed Direct Testimony, p. 2 (December 19, 2011).

⁴⁶ *Halo Wireless, Inc.'s Pre-hearing Memorandum*, p. 2 (January 6, 2012).

⁴⁷ *Id.* at 2-3.

⁴⁸ *Id.* at 1.

offers enhanced capabilities.⁴⁹ Transcom is an end-user, not a carrier.⁵⁰ Therefore, Halo argues that it is a CMRS carrier selling wireless telephone exchange service to an ESP end-user and its traffic is not wireline-originated.⁵¹ All of the calls received from Transcom within a particular MTA are terminated in the same MTA, so that all of the traffic is subject to local charges in the ICA.⁵²

Halo argues that it does not alter or delete call detail in violation of the ICA.⁵³ Halo populates the CN parameter with the Billing Telephone Number ("BTN") of its end-user customer - Transcom.⁵⁴ AT&T alleges improper modification of signaling information related to the CN parameter, but the basis of this claim once again results from the assertion that Transcom is a carrier rather than an end-user.⁵⁵ Halo is exactly following industry practice applicable to an exchange carrier providing telephone exchange service to an end-user, and in particular a communications-intensive business end-user with sophisticated Customer Premises Equipment ("CPE").⁵⁶

Halo asserts that it does not owe facilities charges to AT&T.⁵⁷ Under the ICA, AT&T may only charge for interconnection facilities when AT&T-provided facilities are used by Halo to reach the mutually agreed Point of Interconnection ("POI").⁵⁸ Under the terms of the ICA, the POI is where Halo's network ends.⁵⁹ AT&T is attempting to shift cost responsibility for what it calls facilities" to Halo when the ICA assigns responsibility to AT&T because the "facilities" are all on AT&T's side of the POI.⁶⁰

⁴⁹ *Id.*

⁵⁰ *Id.* at 4.

⁵¹ *Id.* at 4-6.

⁵² *Id.* at 1.

⁵³ *Id.* at 6-8.

⁵⁴ *Id.* at 8.

⁵⁵ *Id.*; see also Russ Wiseman Pre-filed Direct Testimony pp. 26-28 (December 19, 2011).

⁵⁶ *Id.*

⁵⁷ *Id.* at 9-14.

⁵⁸ *Id.* at 9.

⁵⁹ *Id.*

⁶⁰ *Id.* at 14.

FINDINGS AND CONCLUSIONS

Jurisdiction

Throughout these proceedings, Halo has raised objections and challenged the jurisdiction of the Authority to consider the *Complaint* in this matter. The Authority finds that it has jurisdiction to consider the *Complaint* pursuant to both federal and state law. The Authority approved the interconnection agreement between AT&T Tennessee and Halo by order dated June 21, 2010 in TRA Docket No. 10-00063.⁶¹ Interconnection agreements are reviewable and enforceable by the Authority pursuant to 47 U.S.C. § 252 and, in instances where the “market regulation” statute applies, are enforceable pursuant to Tenn. Code Ann. § 65-5-109(m). Further, the Authority has jurisdiction over complaints concerning telecommunications service providers who have elected “market regulation” such as AT&T, pursuant to Tenn. Code Ann. § 65-5-109(m). Halo did not object to the Authority’s jurisdiction to approve the interconnection agreement that now lies at the center of this dispute.⁶²

The District Court, in its Order remanding this matter back to the Authority, also recognized the TRA’s jurisdiction over the interpretation of the ICA. The District Court explained the respective roles of the Court and the Authority, stating:

The Telecommunications Act of 1996 (“the Act”) requires that all ICAs be approved by a state regulatory commission before they become effective. State commissions such as the TRA have authority to approve and disapprove interconnection agreements, such as the one at issue herein. 47 U.S.C. § 252(e)(1). That authority includes the authority to interpret and enforce the provisions of agreements that the state commissions have approved. *Southwestern Bell Telephone Co. v. Public Utility Comm’n of Texas*, 208 F.3d 475, 479 (5th Cir. 2000); *Millennium One Communications, Inc. v. Public Utility Comm’n of Texas*, 361 F.Supp.2d 634, 636 (W.D. Tex. 2005). Federal district courts have jurisdiction to review interpretation

⁶¹ See *In Re: Petition For Approval Of The Interconnection Agreement and Amendment Thereto Between BellSouth dba AT&T Tennessee and Halo Wireless, Inc.*, Docket No. 10-00063, *Order Approving the Interconnection Agreement and Amendment Thereto* (June 21, 2010).

⁶² See *In Re: Petition for Approval of the Interconnection Agreement and Amendment Thereto Between BellSouth dba AT&T Tennessee and Halo Wireless, Inc.*, Docket No. 10-00063.

and enforcement decisions of the state commissions. *Id.*; *Southwestern Bell* at p. 480, 47 U.S.C. § 252(e)(6). Here, as noted above, there is no state commission determination to review.

In *Central Telephone Co. of Virginia v. Sprint Communications Co. of Virginia, Inc.*, 759 F.Supp.2d 772 (E.D. Va. 2011), the court held that federal district courts have federal question jurisdiction to interpret and enforce an ICA, pursuant to 28 U.S.C. § 1331. *Id.* at 778; see also *BellSouth Telecommunications, Inc. v. MCI Metro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1278-79 (11th Cir. 2003) (federal courts have jurisdiction under Section 1331 to hear challenges to state commission orders interpreting ICAs because they arise under federal law) and *Michigan Bell Telephone Co. v. MCI Metro Access Transmission Servs.*, 323 F.3d 348, 353 (6th Cir. 2003) (federal courts have jurisdiction to review state commission orders for compliance with federal law). Although these cases involved state commission orders, their holdings provide guidance on this issue.

Based on the reasoning in the above-cited cases, the Court finds that it has subject matter jurisdiction to hear this matter, pursuant to 28 U.S.C. § 1331 because the ICAs arise under federal law. As stated in *Verizon Maryland, Inc. v. Global NAPS, Inc.*, 377 F.3d 355, 364 (4th Cir. 2004).

The fact that this Court has jurisdiction does not end the matter, however. The fact that the Court *could* hear this action does not necessarily mean the Court *should* hear this action. Although the Act details how parties, states and federal courts can draft and approve ICAs, it is silent on how and in what fora parties can enforce ICAs. *Global NAPS, Inc. v. Verizon New England Inc.*, 603 F.3d 71, 83 (1st Cir. 2010). Because the Act does not specifically mandate exhaustion of state action, whether to construe the Act as prescribing an exhaustion requirement is a matter for the Court's discretionary judgment. *Ohio Bell Tel. Co., Inc. v. Global NAPS Ohio, Inc.*, 540 F.Supp.2d 914, 919 (S.D. Ohio 2008).

The Third Circuit Court of Appeals has held that interpretation and enforcement actions that arise after a state commission has approved an ICA must be litigated in the first instance before the relevant state commission. *Core Communications, Inc. v. Verizon Pennsylvania, Inc.*, 493 F.3d 333, 344 (3d Cir. 2007). A party may then proceed to federal court to seek review of the commission's decision. *Id.* Citing *Core*, a district court in Ohio has also held that a complainant is required to first litigate its breach-of-ICA claims before the state commission in order to seek review in the district court. *Ohio Bell*, 540 F.Supp.2d at 919-920 (citing cases from numerous district courts).

On the other hand, in *Central Telephone*, the court held that a party to an ICA is not required to exhaust administrative remedies by bringing claims for breach of an ICA first to a state commission. *Central Telephone*, 759 F.Supp.2d at 778 and 786.

The Court agrees with the reasoning of the *Core* and *Ohio Bell* opinions. The Act provides for judicial review of a “determination” by the state commission. Until such determination is made, the Court cannot exercise this judicial review. *See Ohio Bell*, 540 F.Supp.2d at 919. As the *Core* court stated: “a state commission’s authority to approve or reject an interconnection agreement would itself be undermined if it lacked authority to determine in the first instance the meaning of an agreement that it has approved.” *Core*, 493 F.3d at 343 (citing *BellSouth Telecommunications*, 317 F.3d at 1278, n.9).⁶³

The Authority is mindful, however, of the restrictions placed upon these proceedings by the Order of the Bankruptcy Court. In an Order issued on October 26, 2011, the Bankruptcy Court ruled that “pursuant to 11 U.S.C. § 362(b)(4), the automatic stay imposed by 11 U.S.C. § 362 . . . is not applicable to currently pending State Commission Proceedings,” including proceedings brought by AT&T.⁶⁴ However, the Bankruptcy Court further stated that

any regulatory proceedings . . . may be advanced to a conclusion and a decision in respect of such matters may be rendered; provided however, that nothing herein shall permit, as part of such proceedings:

- A. liquidation of the amount of any claim against the Debtor; or
- B. any action which affects the debtor-creditor relationship between the Debtor and any creditor or potential creditor.⁶⁵

Therefore, nothing in this Order is intended to permit as part of these proceedings the liquidation of the amount of any claim against Halo or to affect the debtor-creditor relationship between the Parties beyond that permitted in the Bankruptcy Court’s October 26, 2011 Order.

AT&T’s Complaint - Count 1

Count 1 of the *Complaint* alleges that Halo has breached the ICA by impermissibly sending traffic originating from wireline telephones to AT&T, although the interconnection agreement only

⁶³ *BellSouth Telecommunications, Inc. v. Halo Wireless, Inc.*, Case No. 3-11-0795, M.D. Tenn., *Memorandum*, pp. 4-6 (November 1, 2011).

⁶⁴ *In re: Halo Wireless, Inc.*, Case No. 11-42464, Bkrtcy. E. D. Tex., *Order Granting Motion of the AT&T Companies to Determine Automatic Stay Inapplicable and for Relief from the Automatic Stay*, p. 1 (October 26, 2011).

⁶⁵ *In re: Halo Wireless, Inc.*, Case No. 11-42464, Bkrtcy. E. D. Tex., *Order Granting Motion of the AT&T Companies to Determine Automatic Stay Inapplicable and for Relief from the Automatic Stay*, p. 2.

permits Halo to send AT&T traffic that originates from wireless networks. The applicable language from the interconnection agreement reads:

Whereas, the Parties have agreed that this Agreement will apply only to (1) traffic that originates on AT&T's network or is transited through AT&T's network and is routed to Carrier's wireless network for wireless termination by Carrier; and (2) traffic that originates through wireless transmitting and receiving facilities before [Halo] delivers traffic to AT&T for termination by AT&T or for transit to another network.⁶⁶

The Authority interprets the language of the ICA to require Halo only to deliver traffic that has originated through wireless transmitting and receiving facilities. Thus, evidence that Halo has delivered wireline-originated traffic will result in a finding that Halo has breached the ICA.

The Authority has reviewed Halo's *ex parte* filings with the FCC in the *Connect America Fund* docket, where the description of Halo and Transcom's operations is the same as that which has been presented to the TRA in this proceeding. Indeed, reviewing the *ex parte* filings made by Halo makes it clear that the FCC was aware of Halo's assertion that it provided service to ESPs and used wireless technology. In the resulting *Connect America Fund Order*, the FCC addressed and rejected Halo's assertion that traffic from its customer Transcom is wirelessly originated. The *Connect America Fund Order* states:

We first address a dispute regarding the interpretation of the intraMTA rule. Halo Wireless (Halo) asserts that it offers "Common Carrier wireless exchange services to ESP and enterprise customers" in which the customer "connects wirelessly to Halo base stations in each MTA." It further asserts that its "high volume" service is CMRS because "the customer connects to Halo's base station using wireless equipment which is capable of operation while in motion." Halo argues that, for purposes of applying the intraMTA rule, "[t]he origination point for Halo traffic is the base station to which Halo's customers connect wirelessly." On the other hand, ERTA claims that Halo's traffic is not from its own retail customers but is instead from a number of other LECs, CLECs, and CMRS providers. NTCA further submitted an analysis of call records for calls received by some of its member rural LECs from Halo indicating that most of the calls either did not originate on a CMRS line or were not intraMTA, and that even if CMRS might be used "in the middle,"

⁶⁶ J. Scott McPhee, Pre-filed Direct Testimony, pp. 6-7 (December 19, 2011).

this does not affect the categorization of the call for intercarrier compensation purposes. These parties thus assert that by characterizing access traffic as intraMTA reciprocal compensation traffic, Halo is failing to pay the requisite compensation to terminating rural LECs for a very large amount of traffic. Responding to this dispute, CTIA asserts that “it is unclear whether the intraMTA rules would even apply in that case.”⁶⁷

After clearly describing the operations of Halo, including its use of wireless technology and relationship with Transcom, the FCC found that calls are not originated by Transcom and that wireline originated calls are not reclassified as wireless calls because of a wireless link in the middle of the call path. The FCC in the *Connect America Fund Order* continues:

We clarify that a call is considered to be originated by a CMRS provider for purposes of the intraMTA rule only if the calling party initiating the call has done so through a CMRS provider. Where a provider is merely providing a transiting service, it is well established that a transiting carrier is not considered the originating carrier for purposes of the reciprocal compensation rules. Thus, we agree with NECA that the “re-origination” of a call over a wireless link in the middle of the call path does not convert a wireline-originated call into a CMRS-originated call for purposes of reciprocal compensation and we disagree with Halo’s contrary position.⁶⁸

The Authority agrees with the FCC’s rejection of Halo’s assertions and finds that the “re-origination” of a call over a wireless link in the middle of the call path does not convert a wireline-originated call into a wireless-originated call for purposes of reciprocal compensation.

Nor does Halo deny that it is sending traffic that originated on the wireline PSTN.⁶⁹ In response to the question, “Do you admit that some of the communications in issue actually started on other networks?” Halo’s witness Mr. Wiseman responds “Most of the calls probably did start on other networks before they came to Transcom for processing. It would not surprise me if some of them started on the PSTN.”⁷⁰

⁶⁷ *Connect America Fund Order*, ¶ 1005 (footnotes omitted). The term “CLEC” refers to Competitive Local Exchange Carrier.

⁶⁸ *Connect America Fund Order*, ¶ 1006 (footnotes omitted).

⁶⁹ The term “PSTN” refers to the Public Switched Telephone Network, which means the calls were originated on the landline network.

⁷⁰ Russ Wiseman, Pre-filed Direct Testimony, p. 14 (December 19, 2011).

AT&T's traffic study also demonstrates that Halo has delivered wireline traffic to AT&T. AT&T estimates that about 74% of the traffic Halo sends to AT&T originates on the networks of landline carriers.⁷¹ Even though Halo does not deny it has likely sent wireline traffic to AT&T, it contests the accuracy of AT&T's traffic study. Halo's arguments against AT&T's traffic study are: (1) that telephone numbers are an unreliable indicator of who originates a call, if wireless technology is used for the call and where the call originates and (2) calls that originate using IP technology are not landline calls.

The Authority acknowledges that a certain degree of imprecision can occur when analyzing the origin to individual telephone calls, due to factors such as the advent of number portability and the growth of wireless and IP telephony. However, because of these technical issues, the industry has developed conventions and practices to evaluate calls for the purpose of intercarrier compensation. The Authority finds that the methodology used to collect the data and the interpretation of the data in the AT&T study are based upon common industry practices to classify whether traffic is originated on wireline or wireless networks. In addition, the Authority finds that the convention of collecting data for a single week is sufficient to demonstrate whether wireline traffic was sent to AT&T by Halo. Further, Halo identifies several calls included in AT&T's traffic study as likely being IP-originated,⁷² which is considered by the industry to be wireline-originated for the purpose of intercarrier compensation rules.⁷³

Based upon the Authority's agreement with the FCC's dispositive decision in the *Connect America Fund Order*, Halo's admission that it has delivered wireline-originated and IP-originated traffic to AT&T, and the information contained in AT&T's traffic study, the Authority finds that Halo has materially breached its interconnection agreement with AT&T.

⁷¹ Mark Neinast, Pre-filed Direct Testimony, pp. 3, 11 and Attachment MN-3 (December 19, 2011).

⁷² Russ Wiseman, Pre-filed Rebuttal Testimony, pp. 8-9 (January 3, 2012).

⁷³ Mark Neinast, Pre-filed Rebuttal Testimony, p. 6 (January 3, 2012).

AT&T's Complaint - Count 2

Count 2 of the *Complaint* alleges that Halo breached its interconnection agreement with AT&T by improperly altering call detail information that allows AT&T to properly classify calls for the purpose of intercarrier compensation. Section XIV.G of the ICA requires:

The parties will provide each other with the proper call information, including all proper translations for routing between networks and any information necessary for billing where BellSouth provides recording capabilities. This exchange of information is required to enable each party to bill properly.⁷⁴

In addition, Section XIV.E of the ICA also requires Halo to provide many types of call detail information, including the Charge Number.

In most cases, industry members use the Calling Party Number ("CPN") to determine whether a call is jurisdictionally long-distance or local. In rare cases a CN is included in the call detail record to indicate the number that will actually be financially responsible for the call. For example, some businesses want all calls made by its employees in a particular office to be billed to single number. Halo admits that it uses Transcom's BTN to populate the CN fields on traffic since February 2011.⁷⁵

As with Count 1, the Authority finds that the FCC's *Connect America Fund Order* dispositively resolves this issue. Because the FCC dismisses "re-origination" by Transcom, Transcom clearly cannot be the originating entity and thus inserting Transcom's number as the Charge Number is inappropriate. Therefore, because Halo has improperly altered call detail information, the Authority finds that Halo has materially breached its interconnection agreement with AT&T.

⁷⁴ *Complaint*, p. 4 (July 26, 2011).

⁷⁵ Russ Wiseman, Pre-filed Direct Testimony, pp. 29-30 (December 19, 2011).

AT&T's Complaint – Count 3

Count 3 of the *Complaint* alleges that Halo has not properly compensated AT&T for the traffic it has delivered. Halo has been paying AT&T reciprocal compensation, which is only appropriate if the end-user initiated the call wirelessly within the MTA in which it is terminated, instead of switched access charges, which are appropriate for wireline-originated calls. The FCC's decision in the *Connect America Fund Order*, with which the Authority concurs, is that Halo's traffic does not originate within an MTA with its customer Transcom. In addition, AT&T's traffic study demonstrates that AT&T terminated calls that originated outside the MTA where it was terminated. Further, Halo's use of MTA specific numbers to assert a 100% intra-MTA factor necessarily implies that switched access charges were avoided since Transcom was not the true originating party.

The Authority's findings on Counts 1 and 2 of the *Complaint* concerning the wireline and IP-origination of Halo's traffic necessarily lead to the conclusion that Halo has not been properly compensating AT&T for the traffic it has delivered. The payment of reciprocal compensation is only appropriate if the end-user, which is not Transcom, initiated the call wirelessly within the MTA where it is terminated. Thus, Halo has failed to compensate AT&T for calls where it was due switched access charges. Therefore, the Authority finds that Halo is liable to AT&T Tennessee for access charges on the interstate and intrastate interLATA and intraLATA landline traffic it has sent to AT&T Tennessee.

AT&T's Complaint - Count 4

Count 4 of the *Complaint* alleges that Halo has refused to pay AT&T for transport facilities. Section V.B, page 10 of the ICA states:

BellSouth will bear the cost of the two-way trunk group for the proportion of the facility utilized for the delivery of BellSouth originated Local traffic to Carrier's POI within BellSouth's service territory and within the LATA (calculated based on the number of minutes of traffic identified as BellSouth's divided by the total minutes of use on the facility), and Carrier will provide or bear the cost of the two-way trunk group for all other traffic, including Intermediary traffic.⁷⁶

Halo does not dispute that it terminates all of its traffic on AT&T's network, but it does dispute AT&T's charges for the two-way trunk groups that connect the Parties. Halo details the arrangement of facilities with which it connects to AT&T in various locations, and it cites from FCC rules to argue that AT&T cannot charge Halo for facilities on AT&T's side of the POI.⁷⁷ This line of reasoning might be appropriate if Halo were a CLEC. However, Halo is not a CLEC but rather a CMRS provider, and under the ICA it signed with AT&T, each party is required to pay its share of the facilities cost. The Authority finds that Halo owes AT&T for the proportionate share of the facilities that connect Halo's Point of Presence ("POP") to AT&T's network as required by the ICA. The ICA allocates the costs of facilities based on the proportion of traffic each party sends to the other party, and since Halo sends 100 % of its traffic to AT&T, the Authority finds that Halo should pay 100% of the cost for these facilities as required by the ICA.

Transcom Is Not an Enhanced Service Provider

The FCC has established a bright-line rule that the "enhanced" service designation does not apply to services that merely "facilitate establishment of a basic transmission path over which a telephone call may be completed, without altering the fundamental character of the telephone service," and that a service is not "enhanced" when the service does not alter the fundamental character of the service *from the end-user's perspective*.⁷⁸ Thus, for example, the FCC has held that

⁷⁶ Mark Neinast, Pre-filed Direct Testimony, p.19 (December 19, 2011).

⁷⁷ Russ Wiseman, Pre-filed Direct Testimony, p. 41 (December 19, 2011).

⁷⁸ *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934*, 11 FCC Rcd. 21905, ¶ 107 (1996).

services are not “enhanced” when customers use the same dialing method for allegedly “enhanced” calls that they would for any other call,⁷⁹ or where the alleged “enhancement” was made “without the advance knowledge or consent of the customer” that placed the call and the customer is not “provided with the ‘capability’ to do anything other than make a telephone call.”⁸⁰

The Authority finds that Transcom’s services fail to meet the FCC’s bright-line rule, since the record in this proceeding indicates that Transcom provides no services to actual end-users and does not offer any enhancements discernable to the person that actually places the call.⁸¹ The record also supports the conclusion that end-users are completely unaware that Transcom is even involved in call delivery.⁸² Nor does Halo’s testimony prove that Transcom is an ESP. Halo asserts that Transcom

... employs computer processing applications that act on the format, content, code, protocol or similar aspects of the received information. The platform will provide the customer additional, different, or restructured information. This is done by generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications.⁸³

However, despite the claim of computer processing of data, Transcom only reduces background noise and inserts “comfort noise” in periods of silence so that those periods of silence are not mistaken for the end of a call.⁸⁴ The Pennsylvania Public Utility Commission rejected a similar claim relating to Transcom’s services, finding that “the removal of background noise” and

⁷⁹ *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 FCC Rcd. 7457, ¶ 15 (2004) (“*IP-in-the-Middle Order*”).

⁸⁰ *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, 20 FCC Rcd. 4826, ¶ 16, n. 28 (2005) (“*AT&T Calling Card Decision*”).

⁸¹ Mark Neinast, Pre-filed Rebuttal Testimony, p. 5 (January 3, 2012).

⁸² *Id.*

⁸³ Robert Johnson, Pre-filed Rebuttal Testimony, p. 12 (January 3, 2012).

⁸⁴ *Id.* at 12-13.

“the insertion of white noise” do not make Transcom an ESP.⁸⁵ The alleged “enhancements” that Transcom claims it makes to calls that transit its network are simply processes to improve the quality of the call. Telecommunications networks have been routinely making those types of improvements for years and, in some cases, decades. Carriers have routinely incorporated equipment into networks that have, for example, expanded the dynamic range of a voice call to improve clarity. The conversion from analog to digital and back to analog has significantly improved call quality, yet none of these processes are deemed “enhancements” in the sense of an ESP.⁸⁶ For the reasons above, the Authority finds that Transcom is not an ESP for this particular traffic.

IT IS THEREFORE ORDERED THAT:

1. Halo Wireless Inc.’s *Motion to Dismiss Complaint With Prejudice* is denied.
2. BellSouth Telecommunications, LLC d/b/a AT&T Tennessee is authorized to terminate the interconnection agreement previously approved by the Authority in TRA Docket No. 10-00063 and to stop accepting traffic from Halo Wireless, Inc.
3. Halo Wireless, Inc. is liable to BellSouth Telecommunications, LLC d/b/a AT&T Tennessee for access charges on the interstate and intrastate interLATA and intraLATA landline traffic it has sent to AT&T Tennessee thus far and for the interconnection facilities it has obtained from AT&T Tennessee. However, nothing in this Order is intended to permit as part of these proceedings the liquidation of the amount of any claim against Halo or to affect the debtor-creditor relationship between the Parties beyond that permitted in the *Order Granting Motion of the AT&T*

⁸⁵ *Palmerton Tel. Co. v. Global NAPS South, Inc., et al.*, PA PUC Docket No. C-2009-2093336, 2011 WL 1259661, at 16-17 (Penn. PUC, March 16, 2010). (“We find that Transcom does not supply GNAPS with ‘enhanced’ traffic under applicable federal rules”). Note that the Pennsylvania Public Utility Commission specifically rejected the Transcom Bankruptcy Court’s April 28, 2005 Memorandum Opinion finding Transcom to be an ESP on the basis that Transcom had indicated in that proceeding that it provided “data communications services over private IP networks (VoIP).” *Id.* The Authority is not persuaded by the Transcom bankruptcy court rulings regarding Transcom’s status as an ESP, either.

⁸⁶ *Id.*

Companies to Determine Automatic Stay Inapplicable and for Relief From the Automatic Stay [Dkt. No. 13], issued by the United States Bankruptcy Court for the Eastern District of Texas, Sherman Division, in Case No. 11-42464-btr-11 on October 26, 2011. AT&T Tennessee may pursue further action for the collection of access charges or facilities charges in the United States Bankruptcy Court for the Eastern District of Texas, Sherman Division, or other appropriate fora as permitted by that Court.

4. Any party aggrieved by the Authority's decision in this matter may file a Petition for Reconsideration with the Authority within fifteen days from the date of this Order.

5. Any party aggrieved by the Authority's decision in this matter has the right to judicial review by filing a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty days from the date of this Order.

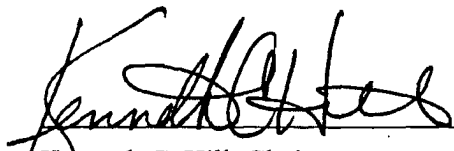


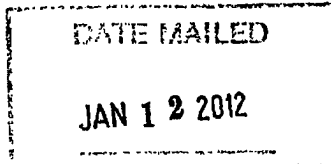

Kenneth C. Hill, Chairman
Sara Kyle, Director
Mary W. Freeman, Director

EXHIBIT L



PUBLIC SERVICE COMMISSION OF WISCONSIN

Investigation into Practices of Halo Wireless, Inc.,
and Transcom Enhanced Services, Inc.

9594-TI-100

**ORDER DENYING MOTIONS TO DISMISS
IN PART WITH PREJUDICE AND IN PART WITHOUT PREJUDICE**

This Order denies, in part with prejudice and in part without prejudice, the Motions to Dismiss that were filed by Halo Wireless, Inc. (Halo), and Transcom Enhanced Services, Inc. (Transcom), on November 18, 2011.

The Commission opened this docket on its own motion by a Notice of Proceeding dated October 20, 2011. On November 18, 2011, Halo and Transcom each filed a Motion to Dismiss. On November 23, 2011, a Prehearing Conference was held in this docket that identified an issues list for the docket and set a schedule for the filing of testimony and a hearing date. On December 5 and December 6, 2011, responses to the Motions to Dismiss were filed by the Wisconsin Rural Local Exchange Carriers, the TDS Telecom Companies,¹ and Wisconsin Bell, Inc., d/b/a AT&T Wisconsin. On December 13, 2011, Halo and Transcom each filed a reply in support of their Motions to Dismiss. At its open meeting of January 5, 2012, the Commission denied the Motions to Dismiss, some parts with prejudice and some without, as more fully described below.

In the Motions to Dismiss, Halo and Transcom raise issues or arguments of procedure and notice and of substantive jurisdiction. On procedure and notice, Halo and Transcom argue the Commission erred in the opening of the docket (referencing a staff request for a

¹ On December 6, 2011, the Wisconsin State Telecommunications Association filed a letter to join the TDS Telecom Companies' response.

Docket 9594-TI-100

docket number), in the identification of this docket as a “proceeding” as opposed to an “investigation,” in the specification of this matter as a Class 1 contested case, and in failing to notice potential adverse outcomes. Halo and Transcom also argue that the Commission was effectively estopped from acting in this case because of bankruptcy court actions and activities in other states. On the jurisdictional matters, Halo argues that it is a Commercial Mobile Radio Service (CMRS) provider and thus not subject to Commission jurisdiction. Further, because Halo views Transcom as an end user customer, it contends that the services it provides to Transcom are exchange services, not toll services, and thus access charges are not applicable. Likewise, Transcom identifies itself as an enhanced service provider (ESP), and as such, it alleges, it is not subject to Commission jurisdiction. Transcom argues that as an ESP, it provides no telecommunications service and thus would generate no traffic subject to access charges.

The procedural and notice arguments raised by Halo and Transcom are unconvincing and without merit. The opening of the matter and the notice process used followed traditional and standard Commission process and practice and further yielded no harm to the ability of Halo and Transcom to fully participate in this docket. Halo and Transcom have a full opportunity to explain, defend, and argue the issues at the hearing as scheduled at the Prehearing Conference. Further, nothing in the bankruptcy court actions cited by Halo and Transcom impacts any of the actions taken by the Commission to move this case forward for investigation. The Commission finds no merit in the Halo and Transcom collateral estoppel arguments and the alleged violations of the scope of the current bankruptcy stay. The procedural and notice matters raised in the

Docket 9594-TI-100

Motions to Dismiss, and the collateral estoppel arguments and the alleged violations of the scope of the bankruptcy stay arguments raised, are thus denied with prejudice.

As to the jurisdiction arguments, the self-identification of Halo and Transcom as a CMRS provider and an ESP, respectively, do not trump the very basis for opening the docket – to investigate the nature of these two entities and the services they are providing in Wisconsin. By identifying these very matters as issues for the docket and setting a process for data requests, testimony and hearing (including cross-examination) and subsequent briefing, the Commission docket provides Halo and Transcom ample due process to make their factual arguments² and related jurisdictional claims. Investigating who these providers are and what they are doing will determine, per Wisconsin statutes and other relevant law, what their appropriate classifications are and thus what obligations exist or do not exist as to the handling of their traffic and the appropriate compensation mechanisms that should apply. A claim of no jurisdiction is quite different than a “finding” of no jurisdiction, and this proceeding will focus exactly on the latter. Thus, the substantive jurisdictional arguments related to the Motions to Dismiss are denied without prejudice.

The Commission has jurisdiction to issue this Order under Wis. Stat. §§ 196.02(1) and (7), 196.016, 196.04, 196.219, 196.26, 196.28, 196.44, and other pertinent provisions of Wis. Stat. ch. 196.

ORDER

1. This Order is effective the day after the date of mailing.

² For instance, the arguments raised by Transcom about the Commission’s lack of jurisdiction over an ESP (pages 10-15 of its Motion) and Halo’s arguments about the Commission’s lack of jurisdiction over CMRS providers (pages 11-24 of its Motion).

Docket 9594-TI-100

2. The November 18, 2011, Motions to Dismiss of Halo Wireless, Inc., and Transcom Enhanced Services, Inc., are denied. As described above, the procedural and notice arguments or claims raised in the motions are denied with prejudice. The substantive aspects related to jurisdiction are denied without prejudice.

Dated at Madison, Wisconsin, January 10, 2012

By the Commission:

Sandra J. Paske

Sandra J. Paske
Secretary to the Commission

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See attached Notice of Rights

PUBLIC SERVICE COMMISSION OF WISCONSIN
610 North Whitney Way
P.O. Box 7854
Madison, Wisconsin 53707-7854

**NOTICE OF RIGHTS FOR REHEARING OR JUDICIAL REVIEW, THE
TIMES ALLOWED FOR EACH, AND THE IDENTIFICATION OF THE
PARTY TO BE NAMED AS RESPONDENT**

The following notice is served on you as part of the Commission's written decision. This general notice is for the purpose of ensuring compliance with Wis. Stat. § 227.48(2), and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

PETITION FOR REHEARING

If this decision is an order following a contested case proceeding as defined in Wis. Stat. § 227.01(3), a person aggrieved by the decision has a right to petition the Commission for rehearing within 20 days of mailing of this decision, as provided in Wis. Stat. § 227.49. The mailing date is shown on the first page. If there is no date on the first page, the date of mailing is shown immediately above the signature line. The petition for rehearing must be filed with the Public Service Commission of Wisconsin and served on the parties. An appeal of this decision may also be taken directly to circuit court through the filing of a petition for judicial review. It is not necessary to first petition for rehearing.

PETITION FOR JUDICIAL REVIEW

A person aggrieved by this decision has a right to petition for judicial review as provided in Wis. Stat. § 227.53. In a contested case, the petition must be filed in circuit court and served upon the Public Service Commission of Wisconsin within 30 days of mailing of this decision if there has been no petition for rehearing. If a timely petition for rehearing has been filed, the petition for judicial review must be filed within 30 days of mailing of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition of the petition for rehearing by operation of law pursuant to Wis. Stat. § 227.49(5), whichever is sooner. If an *untimely* petition for rehearing is filed, the 30-day period to petition for judicial review commences the date the Commission mailed its original decision.³ The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

If this decision is an order denying rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not permitted.

Revised: December 17, 2008

³ See *State v. Currier*, 2006 WI App 12, 288 Wis. 2d 693, 709 N.W.2d 520.

EXHIBIT M

In The Matter Of:
Tennessee Regulatory Authority
Docket No. 11-00108

Complaint of Concord Telephone Exchange, et al.
November 21, 2011

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BEFORE THE TENNESSEE REGULATORY AUTHORITY

IN RE:)

)
)
) COMPLAINT OF CONCORD TELEPHONE
) EXCHANGE, INC., HUMPHREYS COUNTY
) TELEPHONE CO., TELLICO TELEPHONE
) COMPANY, TENNESSEE TELEPHONE
) COMPANY, CROCKETT TELEPHONE
) COMPANY, INC., PEOPLES TELEPHONE
) COMPANY, WEST TENNESSEE TELEPHONE
) COMPANY, INC., NORTH CENTRAL
) TELEPHONE COOP., INC. AND HIGHLAND
) TELEPHONE COOPERATIVE, INC.
) AGAINST HALO WIRELESS, LLC,
) TRANSCOM ENHANCED SERVICES, INC.
) AND OTHER AFFILIATES FOR FAILURE
) TO PAY TERMINATING INTRASTATE
) ACCESS CHARGES FOR TRAFFIC AND
) OTHER RELIEF AND AUTHORITY TO
) CEASE TERMINATION OF TRAFFIC
)

Docket No.
11-00108-----
TRANSCRIPT OF PROCEEDINGSMonday, November 21, 2011

APPEARANCES:

For TDS Telecom, et al: Mr. H. LaDon Baltimore
Mr. Norman J. Kennard
For Halo and Transcom: Mr. Paul S. Davidson
Mr. Steven H. Thomas
Mr. W. Scott McCollough
For AT&T: Ms. Joelle Phillips
For TRA Staff: Mr. Jonathan N. Wike

Reported By:
Patricia W. Smith, LCR, RPR, CCR

**Complaint of Concord Telephone Exchange, et al. - November 21,
2011**

2

1 (The aforementioned cause came on to be
2 heard on Monday, November 21, 2011, beginning at
3 approximately 1:58 p.m., before Chairman Kenneth C.
4 Hill, when the following proceedings were had, to-wit:)

5 CHAIRMAN HILL: All right. If I could
6 have your attention, let's talk about and meet with
7 Docket 11-00108, Concord Telephone Exchange, et al.

8 we're going to call that one "Halo
9 #1." Okay? And the BellSouth Telecom/AT&T and Halo
10 will be "Halo #2."

11 Sorry that we have you as "#2," but
12 that's the way it works out.

13 So if we're talking about it, just for
14 our shorthand purposes, "Halo 1" and "Halo 2," that
15 would be acceptable in our conversations here. I would
16 appreciate that. That way we can make it easier.

17 It seems to me we've got a number of
18 things that need to be done. We want to hear from you
19 today. I notice that Mr. Baltimore filed, in his
20 letter, a procedural schedule, which I don't think we
21 can quite get it on the same level that you have it,
22 simply because we've got a motion to dismiss. The
23 complainants need to reply to that, still. And we have
24 a motion to amend, and a response needs to be received
25 from Halo that -- on those two items.

**Complaint of Concord Telephone Exchange, et al. - November 21,
2011**

3

1 If it's acceptable to the parties, I
2 think giving ten days for those responses would be
3 reasonable. That would be December 1st, which is a
4 Thursday; right? 2:00 p.m. We used to do 4:00 p.m.
5 Not anymore. 2:00 p.m. 2:00 p.m. Okay?

6 And so Halo 1, we're talking about you
7 right now. If we have no problem from Halo about this,
8 the motion for admission pro hac vice, we'll entertain
9 that motion and accept that, if that's without any
10 problem from the representatives of Halo.

11 MR. DAVIDSON: We have no objection to
12 it.

13 CHAIRMAN HILL: No objection?

14 MR. DAVIDSON: No objection.

15 CHAIRMAN HILL: Okay. All right.
16 Very good.

17 (Court reporter requests name
18 of speaker.)

19 MR. DAVIDSON: Yes. If I may, as a
20 preliminary matter --

21 CHAIRMAN HILL: Yes, indeed.

22 Now, let me back up. Since -- you
23 know, I always get the cart before the horse. Now,
24 that's the old way of saying it. I've got the
25 Lamborghini before I get the loan. That's the new way

**Complaint of Concord Telephone Exchange, et al. - November 21,
2011**

4

1 of saying it.

2 (Laughter.)

3 CHAIRMAN HILL: But let's start right
4 over here at -- well, you're not in Halo 1. Forget you
5 for now. We love you, but we're going to forget you
6 for now.

7 But let's start right here and go
8 across, and let's have everybody's name, who you
9 represent, and all that sort of thing, so we can have
10 it on the record. Thank you very much.

11 MR. DAVIDSON: Yes, sir. On Halo 1,
12 my name is Paul Davidson, with the law firm of Waller
13 Lansden here in Nashville. And I have with me, to my
14 immediate right, Mr. Steve Thomas of the McGuire
15 Craddock firm, representing Halo, as well as Scott
16 McCollough, of McCollough Henry, representing Halo --
17 and -- and Transcom -- that's right -- in Halo 1 and in
18 Halo 2.

19 CHAIRMAN HILL: Halo and Transcom.
20 All right.

21 MR. KENNARD: Your Honor, Norman
22 Kennard, Thomas Long, representing TDS Tech and the
23 North Central and Highland Co-ops.

24 MR. BALTIMORE: And for the record,
25 Your Honor, Don Baltimore, local counsel for the

**Complaint of Concord Telephone Exchange, et al. - November 21,
2011**

5

1 complainants.

2 And I would also like to add to what I
3 said earlier about my clients on the phone. Not all of
4 them are on the phone. I have Mr. Bruce Mottern, with
5 TDS Telecom, here and Mr. John McConley with North
6 Central Telecom.

7 CHAIRMAN HILL: All right. And are --

8 MR. BALTIMORE: John McClanahan. I'm
9 sorry.

10 CHAIRMAN HILL: Very good. Okay.
11 Now, thank you very much for introducing yourselves.

12 Do we have an agreement that
13 December 1st is good for the motion, the various
14 motions that we need to hear about -- the replies,
15 actually, to motions?

16 MR. KENNARD: Yes, Your Honor, that's
17 fine.

18 CHAIRMAN HILL: Is that reasonable?

19 MR. KENNARD: Just a point of
20 clarification --

21 CHAIRMAN HILL: Yes. Would you use
22 your microphone, please.

23 MR. KENNARD: There were two motions
24 to dismiss filed. We answered the one involving
25 Transcom. We did not answer the one involving Halo

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1 because of its -- the question of its automatic stay.
2 So if I understood you, that's the one we'll be
3 answering.

4 CHAIRMAN HILL: Mm-hmm. That's
5 correct. Thank you.

6 MR. THOMAS: And December 1 is a fine
7 date for us to respond on their motion to amend. And I
8 simply don't know the procedure. Is there a reply
9 procedure as well? Or is it simply a motion and
10 response?

11 CHAIRMAN HILL: Do you want to explain
12 that, Jon?

13 we'll let our chief counsel explain
14 that.

15 MR. WIKE: If you will have an
16 opportunity to reply?

17 MR. THOMAS: No, I'm just asking
18 whether there is, generally speaking, an opportunity to
19 reply or whether that's not usually done.

20 MR. WIKE: If there usually is an
21 opportunity to reply?

22 MR. THOMAS: Do the --

23 CHAIRMAN HILL: Normally there is.

24 MR. THOMAS: Would the Chairman like
25 to establish dates for replies as well?

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1 CHAIRMAN HILL: Yeah, we usually try
2 to do that within seven days. That's seven calendar
3 days, not seven working days.

4 MR. THOMAS: Because of the
5 bankruptcy, as Mr. Kennard said, there was a motion and
6 then a response. Would we have -- would Halo have
7 until -- for its reply on the motion to dismiss, would
8 you prefer that we do that at December 1? Or in seven
9 days? How would you like to do that?

10 CHAIRMAN HILL: December 1 is fine,
11 because we're not going to be able to call everybody
12 together again, either by phone -- and you're welcome
13 to join us by phone as opposed to in person, if you
14 wish. In other words, we're not going to force you to
15 fly here every time that we meet. If, however, you
16 wish to do so, because it makes your case better,
17 that's fine.

18 December 12th is our next set of
19 conferences here. We'll have a status conference,
20 together, on December 12th, and we will have full
21 reporting capabilities, as we do today, and that sort
22 of thing.

23 It does keep our costs down if we can
24 try to put things together at the same time. We do not
25 want to delay any kind of adjudication just based upon

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1 our financial needs. However, if we can make
2 everything work together, we do.

3 And so as I see it, our status
4 conference, if you want to call it that, would be
5 December 12th, following these filings by the 1st.
6 (Pause.)

7 well, since you're going to have
8 enough time to respond, oral arguments on those motions
9 on the 12th. That way we've got time in between.

10 MR. THOMAS: Mr. Chairman --

11 CHAIRMAN HILL: Yes, sir.

12 MR. THOMAS: -- I have a previous --
13 previously-scheduled conference in Washington, D.C., on
14 December 12th. If that is the date that the -- that
15 the Chairman would like to have this hearing, I will be
16 happy to simply opt out of that conference. But if we
17 could do it on a different day, that would be helpful.

18 CHAIRMAN HILL: Now, would you be
19 available on the 13th?

20 MR. THOMAS: I am opening my calendar
21 as quickly as I can.

22 CHAIRMAN HILL: All right. What I
23 want to do is I want to give you-guys plenty of time,
24 but I don't want to make it so that it is too much time
25 to get answers for you. You know, we -- I think that

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1 is always important that we don't take too much time
2 but we give enough time. (Pause.)

3 So December 13th, what does it look
4 like for you?

5 MR. THOMAS: I'm -- I'm still waiting
6 for the operating system on my phone to cooperate with
7 me.

8 CHAIRMAN HILL: Oh, well. Is that an
9 iPad 4S?

10 MR. THOMAS: It is an iPhone --

11 CHAIRMAN HILL: An iPhone.

12 MR. THOMAS: -- 4, and it's finally
13 working. Okay. I apologize. December 12 will work
14 fine for me.

15 (Laughter.)

16 MR. THOMAS: I had the wrong date in
17 my head. I apologize.

18 CHAIRMAN HILL: I tell you, I love
19 counsel. "Now, could you move that?" "Yeah." "Okay."
20 They agreed. Now you don't have to. Okay. Fine.

21 All right. That'll work. Okay.
22 December 12th, then, we are set for that, and it'll be
23 immediately following our regularly-scheduled
24 conference of the TRA. And that means sometime after
25 one o'clock. We got out before two o'clock in this

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1 last one, and I would suppose our schedule would be
2 about the same. All right? Now . . .

3 So on the 12th, after we have oral
4 arguments, do you think we can work on the procedural
5 schedule on the 12th? Do you think that's reasonable?
6 Depending on how things work. Okay. Is that
7 reasonable for you-guys?

8 MR. KENNARD: Your Honor, is it
9 reasonable --

10 CHAIRMAN HILL: You're on.

11 MR. KENNARD: Is it reasonable, while
12 we're all here, to establish the procedural schedule
13 for moving on?

14 CHAIRMAN HILL: Well, yes, it is. And
15 yet if we -- if we have a motion to dismiss that is
16 granted, then, you know, you have already done your
17 work, but you won't be seeing it through, so . . .

18 I mean, you know, I don't have a
19 problem with it. If you-guys want to do it, go ahead.

20 If you have ever worked with me
21 before, I'll smile at you, and I want you to get things
22 working together as much as you can. And the only time
23 you see me frown is when I don't get cooperation from
24 the parties. The rest of the time I'm a happy guy.

25 So if you want to start working on a

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1 schedule together, I'll let you-guys just talk for a
2 while, and I'll go get a drink of water and I'll come
3 back.

4 MR. THOMAS: Well, Your Honor, we tend
5 to fall into your category on that. We believe that we
6 need to address the motions up front, the motions to
7 dismiss, and entail the jurisdictional concerns that we
8 have.

9 And also, I think it's important to
10 note that we are seeking a stay on the Bankruptcy
11 Court's ruling. And if that is stayed, that would have
12 an effect on how this would move forward. It has been
13 certified to the Fifth Circuit because of the questions
14 that are involved. We strongly believe that the Fifth
15 Circuit will reverse on that order. But, of course,
16 this -- this TRA cannot take actions based upon
17 prognostication of future events in the Fifth Circuit.

18 So we will, of course, cooperate to
19 any extent with opposing counsel, to talk to them about
20 possible scheduling. We would be happy to work with
21 the Tennessee Regulatory Authority. But we believe
22 that until this appeal is decided, all of this effort,
23 all of this effort beyond deciding jurisdiction, which
24 we believe is an important consideration, but all the
25 effort beyond deciding jurisdiction could be wasted --

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1 a waste for everyone involved. And so we would urge
2 that we take care in how we move forward.

3 MR. KENNARD: Your Honor, we
4 appreciate the fact that the motion to abate was denied
5 and that the TRA is moving forward on this. And we
6 further appreciate you-all setting up the conference
7 today on short notice.

8 The proposal that the Authority
9 consider jurisdiction before it considers fact is going
10 to lead to a situation, I'm concerned, for the TRA that
11 it doesn't have the facts it needs to decide
12 jurisdiction. For example, Halo will assert that it is
13 a commercial mobile radio service carrier. They will
14 not present any facts as to why they are. There will
15 be no testimony as to why they are. There will be no
16 examination of why they claim they are. They will
17 simply apply the label and say, "Because we say we are
18 a CMRS provider, therefore, we are not jurisdictional
19 to you."

20 Now, I further want to point out that
21 Halo is the only debtor-in-bankruptcy. Transcom is
22 not. Whatever happens in the Fifth Circuit level has
23 no effect whatsoever on this case, on Halo 1, which
24 is -- I guess maybe we should re-label it "Halo and
25 Transcom 1," because our case includes the parent

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1 company, if you will, who feeds the traffic to Halo.

2 Their defense has been that they are
3 an ESP, an Enhanced Service Provider -- again, provide
4 no facts so far in their pleadings, simply claim and
5 point to a 2005 Bankruptcy Court decision from Texas
6 stating that they are -- a Bankruptcy Court without the
7 regulatory background and with the primary task of
8 discharging Transcom when it was a debtor from
9 bankruptcy. And we -- and our position is, as we have
10 laid out in our motion to dismiss is, that's not a
11 label that they can ascribe to themselves. It is a
12 fact-based determination based upon the definition of
13 an Information Service Provider, and Enhanced Service
14 Provider, and you can't -- so it's difficult to make a
15 decision, if not impossible, without accepting
16 factually what they have said. And how do you develop
17 those facts without having a hearing?

18 The hearing will also -- those same
19 facts that are being developed will determine what kind
20 of traffic it is. And if the -- if the Authority
21 decides it has the jurisdiction, then it will have the
22 facts available to it to decide whether or not there's
23 been a violation of Tennessee law. There is no
24 requirement that there be two hearings on this. There
25 is no requirement that things occur in a one, two

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1 order, except that obviously the TRA cannot determine
2 that there's been a violation of Tennessee law without
3 also determining there is jurisdiction.

4 But what most jurisdictions do -- the
5 jurisdictions I've been involved in -- is you have one
6 hearing, because all those same facts are germane to
7 both inquiries. And then you take it under advisement,
8 and the first half of your order is, "Do we have
9 jurisdiction?" The second half -- if the answer to the
10 first question is "yes" -- is to determine whether or
11 not there's been a violation.

12 what's being proposed here is not
13 required under -- by the -- by Bankruptcy Judge Rhodes.
14 It's simply a delay and a waste of time. This has
15 been going on now for almost a year. It is costing
16 the -- the complainants here approximately \$125,000 a
17 month, as the meter runs, as the minutes flow, and they
18 receive no compensation. And it is unfair to the
19 companies and their customers to allow this to drag on.

20 So our proposal is -- and you have
21 no -- and there's no reason you can't support this,
22 that you couldn't agree to do this -- that we proceed
23 to do all this simultaneously.

24 Now, I realize you have set up the
25 pleadings schedule. But what I'm suggesting is we're

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1 going to get into that and say, "well, we need -- we
2 need more facts." So let's set up a hearing schedule
3 today for testimony. We have filed testimony in
4 Georgia. We have filed testimony in Texas. Halo and
5 Transcom have filed testimony in Georgia, and they have
6 filed testimony in Texas. The inquiries into what
7 they're doing should be not difficult for them to
8 revamp testimony. We're prepared to file testimony in
9 two weeks, and they should be as well -- to move ahead,
10 to get to a hearing in January so this thing can be
11 resolved expeditiously.

12 We have spent six months trying to get
13 this matter before the TRA, as Halo and Transcom filed
14 a removal, which was totally inappropriate, that had to
15 be unwound. They claimed that the automatic stay
16 provisions of the bankruptcy code applied to Halo,
17 which the Bankruptcy Court said they didn't. We're
18 finally here. There is a window here, and I'm urging
19 the TRA to expeditiously move forward and not take this
20 in two steps.

21 CHAIRMAN HILL: What -- excuse me, but
22 what are we looking at as far as the court date? Are
23 we talking -- I mean, it's just now gotten there.
24 They're going to take a look at when they're going to
25 give you a date on it.

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1 MR. THOMAS: Actually, we have
2 maintained the appeal in two different fronts. As I
3 mentioned earlier, the Bankruptcy Court certified the
4 question to the Fifth Circuit, but at the same time the
5 Fifth Circuit has to accept it, they're not forced to.

6 we have also appealed it to the
7 District Court, the referring District Court, from the
8 Bankruptcy Court. And that District Court has just set
9 up -- I believe it was Friday or today -- just set up
10 the numbers of the three cases. They're all in front
11 of Judge Schneider. Judge Schneider is familiar with
12 this matter because the previous Federal Court case in
13 the Eastern District of Texas was filed before that
14 judge. And so we expect that things can be moved
15 forward fairly rapidly. We are going to ask the
16 District Court for a stay of the order's enforcement,
17 pending appeal, and -- and then, to the extent that we
18 are unable to obtain that stay from the District Court,
19 we would seek one from the Fifth Circuit, because we
20 believe that a stay is appropriate.

21 There are several points on which we
22 disagree with our opponents, primarily on the
23 jurisdiction issue. There is no factual inquiry
24 necessary to determine whether or not the TRA, or any
25 other state commission, has been delegated the federal

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1 authority -- the authority from the federal law to
2 address the issue of whether a particular service is or
3 is not CMRS or is or is not an ESP. What our opponents
4 are asking is that you do it all at once; you just
5 assume you have jurisdiction and move forward.

6 what we're asking and what we believe
7 that the Bankruptcy Court made very clear in the order,
8 that said that the action -- the actions before this
9 commission were excepted from the automatic stay. The
10 Court said that the TRA could first determine that it
11 has jurisdiction over these questions. And then -- to
12 the extent that the TRA said it did have jurisdiction
13 on those specific issues, the TRA could then go forward
14 and determine whether or not there had been any
15 violations of state law.

16 But notice in the order the Court said
17 that there could not be any determinations or actions
18 taken, in terms of collecting or pursuing collection of
19 any amounts, and there could be no actions taken that
20 would interfere with the debtor-creditor relationship.
21 And Transcom and Halo have a debtor-creditor
22 relationship. And this -- any actions that would be
23 taken, as requested in the recent request for
24 amendment, we are going to point out to the TRA that
25 those can't be taken, that what the -- because it would

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1 affect the debtor-creditor relationship, even if those
2 actions were taken solely as to Transcom.

3 So what we propose is that the TRA
4 focus first on jurisdiction. To the extent you would
5 like to have further briefing, we would be happy to
6 brief it. We would be happy to provide you with
7 information. To the extent you requested specific
8 information that was relevant to the jurisdiction
9 question, we would be happy to address that issue.

10 The focus of that jurisdictional
11 question we believe is very narrow, and that has to do
12 with not what are these companies doing, but whether
13 the TRA can address the question of what are these
14 companies doing, in terms of whether it is CMRS or not
15 CMRS, whether it is ESP or not ESP.

16 So the answer to the question is -- if
17 you decided, for example, that the TRA had
18 jurisdiction, you could say, "Yes, under federal law we
19 have the jurisdiction to determine whether a particular
20 service is or is not CMRS." That does not require you
21 to determine whether this particular service is CMRS.
22 It has to do with whether you can make that
23 determination. And that's what we are asking you to
24 focus on first.

25 And then to the extent that there's

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1 not a stay, to the extent that there's not a reversal
2 on appeal or otherwise an impediment to going forward,
3 we would ask that you keep in consideration that if
4 there's not a stay, in April to May of this year more
5 than a hundred different local exchange carriers
6 brought twenty different proceedings in front of ten
7 different PUCs, including the TRA. Every attempt we
8 have made to cooperate with them or get their
9 cooperation in putting it all together into one federal
10 court lawsuit has been resisted. Every attempt we have
11 made to assist them in the process of seeking
12 compensation under Section 20.11(e), under the federal
13 regulations, has been virtually rejected on every count
14 except for a very few companies. And a few of them are
15 TDS companies that are getting paid today. Federal
16 regulations establish the payment procedure, and they
17 are getting paid if they follow that procedure. No one
18 is getting hurt by delay.

19 And so we suggest that we proceed in a
20 -- at a more straightforward method, to go through
21 jurisdiction first, and then to go through the process
22 of dealing with the case itself when that comes up.

23 And --

24 MS. PHILLIPS: Director Hill --

25 MR. MCCOLLOUGH: Can I --

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1 MS. PHILLIPS: Oh, I'm so sorry.

2 MR. MCCOLLOUGH: -- speak to this as
3 well?

4 CHAIRMAN HILL: Sir, would you use the
5 microphone, please.

6 MR. MCCOLLOUGH: Yes, sir.

7 MR. THOMAS: I've got one right here.

8 MR. MCCOLLOUGH: My name is Scott
9 McCollough. I also represent Halo and Transcom. I'd
10 like to point you to your rules -- 1220-1-2.03,
11 defenses, answers, motions to dismiss. Those rules
12 specifically contemplate that a respondent can file a
13 motion asserting various things, including lack of
14 jurisdiction over subject matter or the person.

15 The rules in subpart 3 require that a
16 motion to dismiss be disposed prior to a hearing on the
17 merits.

18 Since we now have a motion to amend in
19 this matter, we very well may, in addition to pressing
20 our jurisdictional claims, seek to move for a -- make a
21 motion for more definite statement. All of these
22 things are required to be resolved before the filing of
23 an answer. I will remind the Authority that we have
24 yet to file an answer in this matter. It's only
25 motions to dismiss. So it seems to me that we truly

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1 are getting the loan long before the -- I mean, the
2 Lamborghini far before the loan. We do need to dispose
3 of our preliminary motions before we can even file an
4 answer. Thank you.

5 MR. KENNARD: Mr. Chairman, if I might
6 be -- if I might be allowed some brief rebuttal, we are
7 now parsing this into three different: Does the TRA
8 even have the jurisdiction to decide whether or not
9 they have jurisdiction? Then, does the TRA have the
10 jurisdiction? And then getting on to the merits.

11 My proposal was simple, that we
12 schedule the hearings, the testimony and distribution
13 of testimony, schedule that today. That's all I'm
14 suggesting. We're all here. We all have our calendars
15 out, and we can schedule. You don't have to hold a
16 hearing now. And if you interpret your rule as
17 Mr. McCollough has argued, you can rule on the motion
18 to dismiss beforehand, and then we'll have hearings.
19 But at the rate this is going, we're not going to get
20 to hearings until sometime in January or February.

21 And all I'm saying is we owe it to
22 ourselves to undertake to establish a schedule so you
23 can hear this case expeditiously and we're not sometime
24 in January, then, talking about who is going to file
25 testimony and when.

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1 CHAIRMAN HILL: All right. Thank you
2 for those comments.

3 Yes, ma'am.

4 MS. PHILLIPS: Thank you. I'm sorry
5 to stick my --

6 CHAIRMAN HILL: Well, we'll have
7 you -- we'll have you interrupt. Go ahead.

8 MS. PHILLIPS: Thank you. I'm sorry.

9 But to the extent that we're talking
10 about scheduling, I just wanted to point out that
11 Halo 2 involves a market-regulated carrier. There is
12 an 180-day clock on those kinds of complaints. That
13 would run in January -- January 26th.

14 So, you know, I recognize that there
15 may -- that there may be a need for a hearing, there
16 may be a need for, you know, scheduling. And so we
17 would urge, consistent with TDS and the other
18 complainants in Halo 1, that it's probably worthwhile
19 to go ahead and at least reserve a hearing date in late
20 January. Maybe it will be a hearing. Maybe it will be
21 an opportunity for oral argument on legal matters.
22 Maybe it will be a paper -- you know, a paper-only
23 hearing, one of those things. But reserving a January
24 date probably makes sense.

25 I certainly don't have any objection

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1 on December 1 to, you know, everybody filing their
2 brief on whether the TRA has jurisdiction to proceed in
3 their respective Halo case. I think in both matters
4 it's going to be a pretty short brief, because
5 65-5-109(m) says that the TRA has jurisdiction to
6 resolve complaints about interconnection agreements.
7 And Halo itself submitted its own interconnection
8 agreement to this Authority's jurisdiction in Docket
9 10-00063. So I think that's going to be a pretty quick
10 and easy thing to decide.

11 And there's -- and we've already got a
12 briefing kind of schedule set up for December 1st
13 anyway. We could file on December 1st. Folks could
14 file replies on December 8, and that would have you
15 ready at the next conference to dispose of any -- to
16 the extent someone thinks there's a threshold legal
17 issue, it could be filed and addressed ahead of that
18 conference.

19 So I just threw that out because I --
20 CHAIRMAN HILL: You're suggesting that
21 that -- the idea of jurisdiction, if that's what we're
22 looking at, could be taken care of and disposed of by
23 the 12th?

24 MS. PHILLIPS: I think it very well
25 could be. And I think to the extent that it presents

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1 an additional issue -- as Mr. Kennard said, there may
2 be fact issues associated with that -- I think those
3 papers can sort of spell out what would need to be done
4 to make a ruling if the TRA couldn't do that.

5 But I don't -- I don't think that this
6 concept of two separate steps is something that
7 needs -- that requires two separate schedules. We
8 could go ahead and file, you know, papers on that by
9 December 1st.

10 MR. KENNARD: Mr. Chairman, in support
11 of Ms. Phillips' statements, on Friday the -- may I
12 approach?

13 CHAIRMAN HILL: Yes, certainly.

14 MR. KENNARD: -- the Federal
15 Communications Commission released the long-awaited
16 tome on intercarrier compensation. Halo had sought
17 permission from the FCC to continue to do what it's
18 doing as a CMRS service, and the FCC has flatly
19 rejected that claim. So we do think that the
20 jurisdictional questions are not going to take a lot of
21 the Authority's time to resolve.

22 MR. THOMAS: May I respond just
23 quickly?

24 CHAIRMAN HILL: Certainly.

25 MR. THOMAS: First, on the AT&T side,

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1 speaking in terms of the Halo 2 case, I think we've
2 made very clear in our papers that we filed in
3 virtually every proceeding that's involved AT&T that
4 there are certain aspects of the disputes raised by
5 AT&T in front of various commissions, that we believe
6 those commissions do have jurisdiction over. And
7 AT&T's counsel, I believe the provision that she cited
8 has already been addressed and has been conceded to a
9 great extent in the papers.

10 What we disagree, in terms of
11 jurisdiction, about with AT&T are the same issues that
12 have been raised in the other cases, including Halo 1.
13 And that is whether or not the TRA or another
14 commission would have the jurisdiction at first to
15 decide whether or not a service is or is not wireless.

16 Once that decision is made -- and, for
17 example, I'm just using that particular decision as an
18 example -- once the decision is made that it's wireless
19 and CMRS, the State clearly has a role in determining
20 disputes under ICAs. And we don't want there to be any
21 confusion about that. The jurisdictional issues that
22 are involved here are not the ones that clearly fall
23 under the State's jurisdiction. They are federal
24 issues.

25 The second point that I would raise is

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1 that in the FCC's statement, which you were just
2 handed, they disagreed with Halo but they were
3 incorrect in the way they addressed it. Apparently,
4 there was a misunderstanding that we need to deal with
5 the FCC on, because the FCC assumed the existence of
6 carriers and was directing this in terms of a carrier
7 analysis.

8 As we have pointed out, Transcom
9 Enhanced Services is an Enhanced Service Provider and
10 has been ruled to be an end user under federal law. If
11 it's an end user, then Halo can provide that end user
12 with telephone exchange service. And nothing that was
13 said by the FCC changes that result under federal law.

14 The question becomes, for purposes of
15 jurisdiction, can the TRA take the federal laws
16 governing enhanced services, the federal regulations,
17 the federal precedent, and can the TRA address the
18 issue of whether or not an entity, an entity service is
19 enhanced? And we believe that's a federally-exclusive
20 issue. That's the issue that we believe has to be
21 addressed, not the underlying issue of whether or not
22 the actual service is enhanced, but whether or not that
23 question may be addressed here. So that's what we're
24 focusing on for jurisdiction.

25 we don't believe there's any problem

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1 setting a hearing in January, or at some point, on the
2 jurisdiction issue after the parties have had an
3 opportunity to brief that issue properly, to the extent
4 that the TRA would like that briefing. But we don't
5 believe that now is the time to be setting up
6 procedural activities, because, among other things,
7 although our opponents may not be in this position, as
8 I believe is clear to this Authority, if we have twenty
9 cases in ten states, Mr. McCollough and I and other
10 counsel for Halo or Transcom cannot be in all those
11 places at the same time. And so if there is not a stay
12 that is issued, then we will be facing this exact
13 procedural issue in ten different states in twenty
14 different proceedings.

15 And we would very much appreciate this
16 Authority's and other authorities' patience with our
17 ability to meet all of those schedules.

18 CHAIRMAN HILL: well, maybe we need to
19 hit this thing hard and fast, and that way you won't
20 have to worry about it. That way we can get this thing
21 done by Christmas, and we'll be finished with it. I
22 mean, you know, that way you don't have to worry about
23 it dragging on.

24 I mean, you're very articulate, and I
25 appreciate that, and I'm looking forward to your

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1 argument. I really am looking forward to having the
2 meat of the brief. And I'm looking forward to that
3 from the others, too, so I don't sound like I'm too
4 prejudiced at this point.

5 But, see, coming from the perspective
6 of sitting as Chair of the TRA, I don't care about
7 Texas, and I don't care about Virginia, and I don't
8 care about Kentucky. And I don't care about anybody
9 else, because I took an oath to take care of the people
10 of Tennessee. I didn't take an oath to take care of
11 you. I took an oath to take care of the people of
12 Tennessee. Now, since you operate in the state of
13 Tennessee, my oath includes you, and I'm to treat you
14 fairly, respectfully, professionally, and I will do
15 that. But I don't have to worry about what else you
16 have to do.

17 If I have an employee who has
18 problems, I'll see what I can do to help with their
19 schedule, but they still have to work. They still have
20 to be on the job, and they still have to do their work.

21 If you've got lots of babies that you
22 have to take care of, and apparently you've got twenty
23 of them, you know, you're going to have to figure out
24 what nannies you can pick up to help you with that
25 while it gets done.

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1 So, you know, I'm not trying to be
2 flippant. I'm not trying to be mean. All I'm saying
3 is that I understand that. And we'll be as kind as we
4 can be, but we want to get this thing taken care of so
5 that it's resolved in whatever fashion it's resolved.
6 And I have no prejudice there. I really don't.

7 So whatever way it's resolved, we need
8 to get it resolved as quickly as we can.

9 Now, you have not practiced before us,
10 I don't guess, before. Have you?

11 MR. THOMAS: Not before. No, I have
12 not.

13 CHAIRMAN HILL: Yeah. Well -- and
14 some of these other folks are new to us too. But let
15 me -- let me just tell you, I'm as transparent as
16 glass. Okay? If you make me mad, I'll tell you. If I
17 think you're doing good, I'll tell you that. But it
18 won't be from a prejudicial standpoint. It'll be just
19 from a personal viewpoint.

20 But the one thing I like is truth.
21 The one thing I won't tolerate is lying to this Bench
22 in any fashion, whether it's to the whole group or to
23 myself. And I'm not suggesting that you would do that.
24 I'm just telling you that's how I operate.

25 You're from Texas; right?

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1 MR. THOMAS: Yes.

2 CHAIRMAN HILL: So being from Texas,
3 you're used to straight-shooting, and I expect that
4 that's what we're going to be getting.

5 We don't want to obfuscate. We don't
6 want to create a problem. We want to try to get things
7 going as best we can, giving everybody a fair deal.
8 And that's -- that's what we're here for. I appreciate
9 what you've got to say. I appreciate what the other
10 counsel has had to say on the other side of it.

11 I'd like to take about five minutes,
12 if I could, and talk to our General Counsel, and maybe
13 I've got some ideas after that. I've got a couple of
14 questions for him.

15 And thank you for your comments.

16 MR. THOMAS: Thank you.

17 CHAIRMAN HILL: I appreciate that,
18 from a layperson.

19 Five-minute break.

20 (Recess taken from 2:35 p.m.
21 to 2:53 p.m.)

22 CHAIRMAN HILL: All right. If we
23 could have your attention for just a few more minutes.
24 And I'll ask my General Counsel to interrupt me if I
25 miss something. Okay? I don't mind that, Jon.

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1 All right. First of all, thank you
2 for your willingness to stay at it. I appreciate that.
3 I know we've got at least one counsel that's got to get
4 to a plane, maybe some others. So we will attempt to
5 wrap this up pretty quickly.

6 All right. We reiterate that the
7 complainants are to reply on the motion to dismiss by
8 December 1st. Then there will be a response available
9 to you, rebuttal, if you will, for Halo, by
10 December 8th.

11 On the motion to amend, Halo's
12 responses December 1st, and anything that Concord,
13 et al., have to say will be back to us by the 8th.

14 On the 12th, we will have a status
15 conference. We will hopefully set up, at that point, a
16 procedural schedule, if it is necessary. We'll see
17 what rulings can be made, if any, on that date. Also,
18 I would encourage both parties to be as beefy as
19 possible when it comes to the information, factual
20 information that you're giving us. Give us as much
21 information as you possibly can. That gives you an
22 opportunity to let us see it before it's going to be
23 seen perhaps in direct testimony and that sort of
24 thing, but it helps us understand better how we are to
25 proceed, if we are to proceed. Okay?

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1 In other words, we're not asking you
2 to write a Ph.D. dissertation, and I don't want a lot
3 of words just to have words, but we do want the facts.
4 And if you've got facts for us, let us have them. We
5 don't want to be blind-sided by facts later. We want
6 the facts now, as you weave them in to what you're
7 doing, realizing this is not direct testimony yet. I
8 understand that. But you help me if I have all the
9 facts. Okay?

10 General Counsel, that's basically the
11 way we're looking at it; is that correct?

12 MR. WIKE: I think that's correct,
13 Chairman.

14 CHAIRMAN HILL: All right. Your
15 contact will be Tabatha Blackwell of my office.
16 Tabatha is my senior policy advisor. She will be your
17 contact in my office. My direct office number is
18 (615)741-4648. And Tabatha is at that office number as
19 well, so you can get us there. My administrative
20 assistant, his name is Jimmy Hughes. He will be very
21 kind to you. And if we're not in the office, he'll be
22 the one that you talk to. Okay?

23 All right. Is there anything else we
24 need to do on Halo and Transcom 1?

25 MR. MCCOLLOUGH: Mr. Chairman, may I

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1 ask one clarifying question?

2 CHAIRMAN HILL: Certainly, you may.

3 MR. MCCOLLOUGH: I'm a little bit
4 confused on --

5 CHAIRMAN HILL: That's okay.

6 MR. MCCOLLOUGH: -- which specific --

7 CHAIRMAN HILL: You're not -- are you
8 from here?

9 MR. MCCOLLOUGH: No, sir, I'm not.

10 CHAIRMAN HILL: Okay. I can imagine
11 being confused. That's okay. Go ahead.

12 MR. MCCOLLOUGH: Well, I'm sure if I
13 stay here long enough, I will soon not any longer be
14 confused.

15 CHAIRMAN HILL: Okay.

16 MR. MCCOLLOUGH: TDS did file its
17 response to Transcom's motion to dismiss in Halo 1, and
18 I'm just not certain whether you want Transcom's reply
19 to their response on December 1st or December 8th. And
20 if I may lobby, I would prefer to do it on the 8th, at
21 the --

22 CHAIRMAN HILL: December 8th would be
23 fine.

24 MR. MCCOLLOUGH: Thank you.

25 CHAIRMAN HILL: Yeah, that would be

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1 fine. We don't want to leave you confused. All right.

2 The Halo 1 team, on the Concord side,
3 do you have any questions or things we need to think
4 about?

5 MR. KENNARD: I think we're good, Your
6 Honor. Thank you.

7 CHAIRMAN HILL: All right. I don't
8 want you to miss your plane.

9 MR. KENNARD: I appreciate that.

10 CHAIRMAN HILL: Yeah. Okay. Good.
11 If you're finished, you can go. I know these guys are
12 going to stay on the hot seat for a while. We're going
13 to talk Halo 2 here for just a moment.

14 (Proceedings adjourned at
15 2:58 p.m.)
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1 REPORTER'S CERTIFICATE

2 STATE OF TENNESSEE)

3 COUNTY OF DAVIDSON)

4 I, Patricia W. Smith, Licensed Court
5 Reporter, Registered Professional Reporter, with
6 offices in Nashville, Tennessee, hereby certify that I
7 reported the foregoing proceedings at the time and
8 place set forth in the caption thereof; that the
9 proceedings were stenographically reported by me; and
10 that the foregoing proceedings constitute a true and
11 correct transcript of said proceedings to the best of
12 my ability.

13 I FURTHER CERTIFY that I am not
14 related to any of the parties named herein, nor their
15 counsel, and have no interest, financial or otherwise,
16 in the outcome or events of this action.

17 IN WITNESS WHEREOF, I have hereunto
18 affixed my official signature and seal of office this
19 23rd day of November, 2011.

20
21 PATRICIA W. SMITH, LICENSED
22 COURT REPORTER, REGISTERED
23 PROFESSIONAL REPORTER, CERTIFIED
24 COURT REPORTER, and NOTARY
25 PUBLIC FOR THE STATE OF TENNESSEE

LCR No. 164, Expires 6/30/12

Notary Commission Expires 5/8/12

EXHIBIT N

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION**

In re:	§	Chapter 11
	§	
Halo Wireless, Inc.,	§	Case No. 11-42464-btr-11
	§	
Debtor.	§	

**ORDER GRANTING MOTION OF THE AT&T COMPANIES TO DETERMINE
AUTOMATIC STAY INAPPLICABLE AND FOR RELIEF FROM THE AUTOMATIC
STAY [DKT. NO. 13]**

Upon consideration of the *Motion of the AT&T Companies to Determine Automatic Stay Inapplicable and For Relief from the Automatic Stay* [Dkt. No. 13] (the “AT&T Motion”)¹, and it appearing that proper notice of the AT&T Motion has been given to all necessary parties; and the Court, having considered the evidence and argument of counsel at the hearing on the AT&T Motion (the “Hearing”), and having made findings of fact and conclusions of law on the record of the Hearing which are incorporated herein for all purposes; it is therefore:

ORDERED that the AT&T Motion is GRANTED, but only as set forth hereinafter; and it is further

ORDERED that, pursuant to 11 U.S.C. §362(b)(4), the automatic stay imposed by 11 U.S.C. § 362 (the “Automatic Stay”) is not applicable to currently pending State Commission Proceedings², except as otherwise set forth herein; and it is further

ORDERED that, any regulatory proceedings in respect of the matters described in the AT&T Motion, including the State Commission Proceedings, may be advanced to a conclusion

¹ The Court contemporaneously is entering separate orders granting *The Texas and Missouri Companies’ Motion to Determine Automatic Stay Inapplicable and in the Alternative, for Relief From Same* [Dkt. No. 31] and the *Motion to Determine the Automatic Stay is Not Applicable, or Alternatively, to Lift the Automatic Stay Without Waiver of 30-Day Hearing Requirement* [Dkt. No. 44] filed by TDS Telecommunications Corporation.

² All capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Motion.

and a decision in respect of such regulatory matters may be rendered; *provided however*, that nothing herein shall permit, as part of such proceedings:

- A. liquidation of the amount of any claim against the Debtor; or
- B. any action which affects the debtor-creditor relationship between the Debtor and any creditor or potential creditor (collectively, the “Reserved Matters”); and it is further

ORDERED that nothing in this Order precludes the AT&T Companies³ from seeking relief from the Automatic Stay in this Court to pursue the Reserved Matters once a state commission has (i) first determined that it has jurisdiction over the issues raised in the State Commission Proceeding; and (ii) then determined that the Debtor has violated applicable law over which the particular state commission has jurisdiction; and it is further

ORDERED that the AT&T Companies, as well as the Debtor, may appear and be heard, as may be required by a state commission in order to address the issues presented in the State Commission Proceedings; and it is further

ORDERED that this Court shall retain jurisdiction to hear and determine all matters arising from the implementation and/or interpretation of this Order.

Signed on 10/26/2011

 SR
HONORABLE BRENDA T. RHOADES,
CHIEF UNITED STATES BANKRUPTCY JUDGE

³ The AT&T Companies include Southwestern Bell Telephone Company d/b/a AT&T Arkansas, AT&T Kansas, AT&T Missouri, AT&T Oklahoma, and AT&T Texas; BellSouth Telecommunications, LLC d/b/a AT&T Alabama, AT&T Florida, AT&T Georgia, AT&T Kentucky AT&T Louisiana, AT&T Mississippi, AT&T North Carolina, AT&T South Carolina and AT&T Tennessee; Illinois Bell Telephone Company d/b/a AT&T Illinois; Indiana Bell Telephone Company Inc. d/b/a AT&T Indiana; Michigan Bell Telephone Company d/b/a AT&T Michigan; The Ohio Bell Telephone Company d/b/a AT&T Ohio; Wisconsin Bell Telephone, Inc. d/b/a AT&T Wisconsin; Pacific Bell Telephone Company d/b/a AT&T California; and Nevada Bell Telephone Company d/b/a AT&T Nevada.